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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST, *Petitioner and Plaintiff-Respondent below,*

v.

MOORE-McCORMACK LINES, INC., *Respondent and Defendant-Appellant below.*

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. IN OPPOSITION TO THE PETITION

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

To the Honorable Supreme Court of the United States:

Respondent, Moore-McCormack Lines, Inc., presents this brief in opposition to the petition for the writ.

OPINION OF OREGON SUPREME COURT

The Oregon Court's opinion is reported in 158 Pac. 2d, at page 275. It is so searching, covering as it does every phase of the case, and is so logical, that it leaves

little more to be said. That opinion is a complete justification of the judgment.

It contains, however, one sentence from which we must dissent:—

> "From this review of pertinent decisions it is apparent that there is no decided weight of authority on this important question, which ultimately must be determined by the Supreme Court of the United States." R. p. 37.

This suggests a substantial Federal question. We therefore pass to a consideration of that.

IS THERE A SUBSTANTIAL FEDERAL QUESTION?

In a sense, we have here merely a question of *fact*: Was petitioner an employee of respondent?

Let us expand that thought briefly:

In a Jones Act case, the relationship of employee and employer must exist; and it must be the "natural", "conventional" relationship as understood at common law. *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84; 59 L. Ed. 849; *Hull v. Philadelphia Reading Ry. Co.* 252 U.S. 475; 64 L. Ed. 670. That much being understood, it became merely a question of fact to determine whether petitioner, Hust, was an employee of respondent or not. And the Oregon Supreme Court properly held that there was nothing in the evidence to show that he occupied that posi-

tion; but that, on the contrary, it plainly appeared that he did not.

Let us concede that the Oregon Court decided this as a matter of law, arising under the Jones Act. But does this present a Federal question calling for the interposition of this Honorable Court? To do so, it must be "a federal question of *substance* not theretofore determined by this court", or decided "in a way probably not in accord with applicable decisions of this court." Rule 38, Paragraph 5.

The question of employment has already been "determined by this Court" in the Robinson and Hull cases, supra; and that Hust was not employed by respondent was decided in accord with those many "applicable decisions" which hold that where only one conclusion can be drawn from the evidence, the court should direct a verdict.

New Orleans & N.E.R. Co. v. Harris, 247 U.S. 367, 371-372; 62 L. Ed. 1167, 1171.
Chicago M. & St. P.R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.
Gulf M. & N.R. Co. v. Wells, 275 U. S. 455, 459; 72 L. Ed. 370, 372.
Herron v. So. Pac. Co. 283 U.S. 91, 95-6; 75 L. Ed. 857, 861.
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343-4; 77 L. Ed. 819, 824-5.

Therefore, there is no federal question of substance here.

This leads us logically to a consideration of the evidence upon which the Oregon Supreme Court based its decision.

EVIDENCE SUPPORTING DECISION OF THE OREGON SUPREME COURT

The respondent, Moore-McCormack Lines, Inc., was appointed by the War Shipping Administration as an agent to manage the "business" of the vessel "MARK HANNA". Def. Ex. 21. R. 149, (offered, 116). Cf. Def. Ex. 27, R. Page 174, (offered, 131). Its duties were outlined and limited in a printed contract between the War Shipping Administration and the Agent, known as GAA 4-4-42. Def. Ex. 21. R. Page 149, 150, (offered, 116). Briefly, it may be said that the duties of the Agent under that agreement pertained to the "business" of the vessel, i. e., procuring crews and making them available for engagement by the Master, attending to cargoes, collecting and disbursing moneys on behalf of the United States, and accounting to the United States. The physical operation of the ship was not a duty of the Agent, but remained with the War Shipping Administration.

In that agreement it was expressly provided that the Master of the vessel should be "an agent and employee of the United States," and should "have and exercise full control, responsibility and authority

with respect to the navigation and management of the vessel."; and that the officers and members of the crew should be "subject only to the orders of the Master."

Perhaps we had better quote the pertinent paragraph in full: R. Pages 151-152.

> "(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

Not only was this Service Agreement, as it is called, published in full in the "Federal Register," R. 131, Cf. also R. 173, 174, thus constituting notice of its contents to all the world, including petitioner, but the particular paragraph just quoted was embodied in a special agreement between the War Shipping Administration and petitioner's union, in a signed document called a "Statement of Policy." Def. Ex. 25;

especially that part at R. Page 167-168, (offered, 130).

Thus Hust's own collective bargaining agent not only knew of this paragraph in the agreement, but expressly agreed to it; and if there is any thing at all to "collective bargaining," that knowledge and agreement must be imputed to him. (Not that this would be necessary, Murray v. American Export Lines, 53 Fed. Supp. 861, 863, but it is nevertheless the fact).

Petitioner Hust signed the usual Shipping Articles. Plaintiff's Exhibit 13. R. Page 142-143, (offered, 92). These were between the Master and Hust:

"IT IS AGREED between the Master and seamen, or mariners, of the SS 'MARK HANNA' ", etc., and then comes the agreement, followed by the signatures of the crew, including Hust. The respondent is not a party to the agreement; in fact, its name nowhere appears, except as the address of the Master and in the "block" near the head of the Articles, where are these words:

"War Shipping Administration (Owner)
Moore-McCormack Lines, Inc. (General Agents)"

It is obvious,we think, that since the contract of employment, the Articles, was between the Master and Hust, and since the Master was the employee of the United States, and the crew were subject "only" to his orders, and were paid "in the customary manner with funds provided by the United States," Hust

was employed by the Master for and on behalf of the United States, and no one else.

This in itself should be enough to dispose of the case, but if more were needed, it would be found in the laws of Congress itself. For example, in the Internal Revenue Code, §1621 (a) (9), it says: "For the purpose of Paragraph (8) services performed .... *on or in connection with any vessel as an employee of the United States employed through the War Shipping Administration,* shall not constitute services performed outside the United States." And of course Public Law 17, 78th Congress, §1, (1943 A.M.C. Page 594) specifically refers to seamen, like Hust, as "employees of the United States through the War Shipping Administration" and expressly classifies them as such, and declares that their remedy for injuries shall be enforced under the Suits in Admiralty Act. The House Report 107, accompanying this legislation, is replete with references to these seamen as employees of the United States, and explains that, if injured, they will still retain their rights under the Jones Act, with one modification, viz., that their procedural remedy will be against the United States under the Suits in Admiralty Act. This Report may be found in 1943 A.M.C. Page 606.

Of course Public Law 17 was passed subsequent to this accident, but it is merely a clarifying piece of legislation and shows, as clearly as if it had been passed before, the Congressional intent with regard to these seamen.

We think we have said enough to establish the status of Hust as an employee of the United States, and not of this respondent, and shall therefore pass to another phase of the case.

NO EVIDENCE OF ANY NEGLIGENCE OF RESPONDENT

Entirely aside from the Jones Act, the judgment of the Oregon Court is correct because there is no evidence whatever of any negligence on the part of respondent.

The only possible causes of the accident which the jury could have found were:

(a) A burnt out light bulb.

(b) Absence of the guard-chain around the hatch.

(c) Ordering plaintiff into the dark, unguarded place thus created.

All of these things were responsibilities of the Master, "an agent and employee of the United States," who had "full control" over them; and the respondent had nothing to do with them whatever.

We merely review the essential facts briefly:

1. It was a government ship—not respondent's. Respondent had no physical control of it.

2. Neither Master nor crew were employees of respondent.

3. The Master was "an agent and employee of the United States," and had and exercised "full control, responsibility and authority with respect to the navigation and management of the vessel." And the officers and members of the crew were "subject only to the orders of the Master." (The Service Agreement, Defendant's Exhibit 21, R. 149, 150, 151, (offered, 116).

4. The bulb light was a part of the management of the ship—solely under the Captain's control. When it failed, another was immediately available. The ship was well supplied. There was merely a temporary failure in the *use* of its facilities; by the men responsible therefor—the Captain and his officers.

5. The same may be said of the guard-chain. It was removed by the Captain's own orders a day or two before the accident. R. 106. For some temporary use in connection with the towage. R. 83-84. Suitable rope was "readily" "available," which could have been placed on the stanchions around the hatch, as a substitute guard. R. 106. But the Captain did not have this done, until immediately after the accident, when he personally ordered it. R. 80.

6. As to the order to Hust to go into the hatch, certainly nothing need be said to show respondent's aloofness from it. "The officers and members of the crew shall be subject only to the orders of the

Master." (Def's. Ex. 21, R. at 151). And it is a fact that the order to Hust was given by the Boatswain in the presence and under the authority of the Master. R. 56.

No more need be said to show the complete lack of any evidence connecting respondent with the accident.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

Chicago M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.

SOME FURTHER REMARKS UPON THE PETITION AND BRIEF

We shall now comment briefly on some of petitioner's further contentions.

1. It is suggested in the petition that respondent is claiming an *immunity* under the Jones Act, and that for this reason this court should take jurisdiction. Of course we are not claiming any immunity at all. We are simply claiming that petitioner has not brought himself within the provisions of the Jones Act.

2. Much reliance is placed on the Brady case. We have never understood why. In no respect is it like

the present case. It was not under the Jones Act. The injured man was a customs inspector, not a member of the crew. The Agency Agreement there involved was different from the one in the present case. The only question presented was whether the Suits in Admiralty Act protected an agent from being sued for his own torts. As Mr. Justice Douglas said: "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent nonsuable for their own torts." 317 U. S. at Page 577; 87 L. Ed. at Page 475.

3. On Pages 38 and 39 of petitioner's brief he cites certain decisions of the National War Labor Board and the National Labor Relations Board to support his contention that Hust was an employee of respondent. But it has been expressly held by this Court that in cases before such boards the terms "employee" and "employer" are understood in a sense peculiar to such proceedings, and not in the conventional sense necessary to an action under the Jones Act. National Labor Relations Board v. Hearst Publications, 322 U. S. 111; 88 L. Ed. 1170.

4. On Pages 40 and 41 of petitioner's brief it is suggested that the collective bargaining agreements between respondent and the unions, in which respondent is named as one of the "employers" is evidence that the respondent occupied that position in the case of Hust. This overlooks the fact that the respondent, at the time these agreements were originally made, was operating ships of its own, and, as to

them, actually *was* an employer, and the War Shipping Administration merely adopted these agreements for the purposes of its own ships, but modified them, insofar as employment was concerned, by the "Statement of Policy," in which, by agreement with the unions, it was expressly agreed that in accordance with Article 3A(d) of the Service Agreement the master should be the employee of the United States, and should engage the crews, who would be subject only to his orders, and that the management and navigation of the ship should be solely under him.

(It is worth noting that the Service Agreement itself, in Article 15, recognizes that the Agent has other ships of its own, beside those assigned to it under the Agreement. R. 160).

5. Various other items of so-called "evidence" are referred to on Pages 44 to 48 of the petitioner's brief. They seem to us too slight to notice, and are adequately disposed of in the Oregon Supreme Court's opinion. As to the withholding tax forms, on which respondent's name appears as employer, this was strictly in accordance with the tax laws which require that the person who disburses funds as wages, even though not for his own account, is to be regarded, for the purposes of the tax act, as an employer.

The correspondence between the War Shipping Administration and respondent, regarding the reference of Hust's claim to the respondent's marine P. &

I. underwriters (Petitioner's Brief, Page 45), means nothing when rightly understood. The War Shipping Administration was carrying its own *war* P. & I. insurance, but it was leaving it to the agents to arrange with their own P. & I. underwriters for *marine* P. & I. insurance, which was, however, for the account of the War Shipping Administration, and was *paid for* by the War Shipping Administration. Naturally, therefore, since this accident appeared to be a marine, rather than a war risk, the War Shipping Administration said to respondent: "Refer this to your marine P. & I. underwriters."

6. On Page 48 petitioner makes the extreme suggestion that it was respondent's duty to "maintain" the ship, even to the extent of seeing to it that the bulb light was burning and the guard-chain was in place. How the respondent was to do this some ten thousand miles away petitioner does not make clear.

There was no duty on the respondent to maintain the vessel in such a sense. Its duties are clearly set forth in Article 14 of the Agreement. R. 159. It shall, unless otherwise instructed, and subject to the regulations, instructions and methods of supervision and inspection prescribed by the United States, arrange for the repair of vessels, etc., and generally shall cooperate with the United States in making inspections and investigations. These of course refer to general overhaul repairs, etc., when the vessel is in port. While at sea the vessel is under the

sole management and control of the master. Article 3A(d). R. 151.

7. On Page 49, and again on Pages 58 to 60 of the Petitioner's Brief, it is contended that under this Agency Agreement the respondent became the owner "pro hac vice" of the ship. This certainly indicates a lack of comprehension of what that term means. In general, it means a charterer who takes a vessel from the owner on a bareboat basis. The owner relinquishes all control; and the charterer mans, equips and supplies the vessel, and exercises complete physical control of her. How different that is from the present case needs no comment.

It is interesting to note, in this connection, the title of the Service Agreement. R, middle of Page 150. It reads:

> "Service Agreement for Vessels of Which the War Shipping Administration Is Owner or Owner Pro Hac Vice."

How the War Shipping Administration and the Agent could *both* be owners pro hac vice, counsel has not explained.

All of the items of so-called "evidence of employment" suggested by petitioner are not even a scintilla when propertly understood; but even if they were, they would have to yield to the clear and express provisions of Article 3A(d) of the Agreement, which make it about as clear as the English language

can, that these War Shipping Administration crews engaged by the master and under his sole control are not employees of the Agents. "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." George v. Missouri P. R. Co. 213 Mo. App. 668, 251 S. W. 729, quoted with approval by this Court in the Chamberlain case, Supra, 288 U. S. at Page 341, and in 77 L. Ed at Page 824.

To conclude, the respondent Moore-McCormack Lines, Inc., for the reasons given in this brief, opposes the petition, and asks that it be denied.

Respectfully submitted,

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